CAUSE NO. 06-18-00090-CR

IN THE COURT OF APPEALS

SIXTH JUDICIAL DISTRICT OF TEXAS

TEXARKANA, TEXAS

LARRY THOMAS CHAMBERS, JR.,
Appellant

vs.

THE STATE OF TEXAS,
Appellee

On appeal from the 277th Judicial District Court
of Williamson County, Texas
Trial Court Cause Number 17-0683-K277

STATE'S APPELLATE BRIEF

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Case law **Page**

Constitution, Statutes, and Rules

Secondary Sources

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TO THE HONORABLE COURT OF APPEALS:

COMES NOW, Appellee, the **STATE OF TEXAS**, by and through the Williamson County District Attorney, the Honorable Shawn W. Dick, and, pursuant to Rule 38.2 of the Texas Rules of Appellate Procedure, files this, its Appellate Brief in the above-styled and -numbered cause of action, and in support thereof, would show this Honorable Court as follows:

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Texas Rules of Appellate Procedure 39.1 and 39.7, Appellant has requested oral argument in this case. Therefore, to preserve its right to argue, the State requests oral argument; however, the State believes that the facts and legal arguments herein are adequately presented in the briefs and record, and that the decisional process would not be significantly aided by oral argument.

SUMMARY OF ARGUMENT

Appellant raises four issues on appeal. (1) In his first issue on appeal, Appellant argues that the evidence is legally insufficient to support his conviction for possession of a controlled substance in an amount of four grams or more, but less than 200 grams. Specifically, Appellant contends that the State failed to prove beyond a reasonable doubt that Appellant intentionally or knowingly possessed four grams or more of a controlled substance. The State responds by asserting that the evidence presented at trial clearly supports Appellant's conviction herein. (2) In his second issue, Appellant complains that the trial court erred in denying his pre-trial motion to suppress. Specifically, Appellant alleges that he was detained without reasonable suspicion and arrested without probable cause, in violation of the U.S. Constitution and article 1, section 9 of the Texas Constitution. The State responds

by asserting that the record herein reflects that Appellant was detained and arrested in accordance with the law and Constitution. (3) In his third issue on appeal, Appellant argues that the trial court erred when it denied Appellant a jury instruction pursuant to article 38.23 of the Texas Code of Criminal Procedure. The State responds by asserting that the trial court did not err in denying said jury instruction because Appellant failed to demonstrate any disputed issue of fact that would entitle him such an instruction. (4) In his fourth issue, Appellant complains that his sentence of 20 years' confinement in the penitentiary violates the prohibitions against cruel and unusual punishment in the Eighth Amendment of the U.S. Constitution and Article I, section 13 of the Texas Constitution. U.S. Const. amend. The State responds by asserting that in light of the evidence presented during trial, Appellant's sentence is not grossly disproportionate to the offense, when considering the Appellant's culpability and his prior unadjudicated offenses.

ARGUMENT & AUTHORITIES

State's Response to Appellant's First Issue

In his first issue on appeal, Appellant argues that the evidence is legally insufficient to support his conviction for possession of a controlled substance in an amount of four grams or more, but less than 200 grams. Specifically, Appellant

contends that the State failed to prove beyond a reasonable doubt that Appellant intentionally or knowingly possessed four grams or more of a controlled substance. The State responds by asserting that the evidence presented at trial clearly supports Appellant's conviction herein.

Standard of Review

When determining whether there is sufficient evidence to support a criminal conviction, this Court must consider the combined and cumulative force of all admitted evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, a jury was rationally justified in finding guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). Although the State must prove that a defendant is guilty beyond a reasonable doubt, the State's burden does not require it to disprove every conceivable alternative to a defendant's guilt. *Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016); s*ee also Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995) ("[T]he language of our cases which suggests that a hypothesis of ignorance must be specifically excluded in drug cases is misleading. It is really only another way of saying that hypothetical ignorance can be disproven with satisfactory evidence of actual knowledge."). Further, in a sufficiency inquiry, direct evidence

and circumstantial evidence are equally probative. *Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013).

The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses, and juries may draw multiple reasonable inferences from the facts so long as each is supported by the evidence presented at trial. *Jackson*, 443 U.S. at 319; *see Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007). The jury is not, however, allowed to draw conclusions based on speculation. *Hooper*, 214 S.W.3d at 16. Unlike a reasonable inference, speculation is insufficiently based on the evidence to support a finding beyond a reasonable doubt. *Id*. When the record supports conflicting inferences, this Court should presume that the jury resolved the conflicts in favor of the verdict. *Jackson*, 443 U.S. at 326.

"Affirmative Links" and Knowing Possession of Contraband

A defendant's mere presence is insufficient to establish possession. *Oaks v. State*, 642 S.W.2d 174, 177 (Tex. Crim. App. 1982). When the contraband is not in the exclusive possession of the defendant, a fact finder may nonetheless infer that the defendant intentionally or knowingly possessed the contraband if there are sufficient independent facts and circumstances justifying such an inference. [1]

1 The affirmative-links analysis is not a distinct rule of legal sufficiency; rather, it is a helpful guide to applying the *Jackson* legal-sufficiency standard of review in the context of circumstantial evidence cases. *Evans v. State*, 202 S.W.3d 158, 161 n. 9 (Tex. Crim. App. 2006).

Poindexter v. State, 153 S.W.3d 402, 406 (Tex. Crim. App. 2005) (*quoting Deshong v. State*, 625 S.W.2d 327, 329 (Tex. Crim. App. 1981)). In *Evans*, the Court of Criminal Appeals summarized a non-exclusive list of fourteen factors from the Fourteenth Court of Appeals that may indicate a link connecting the defendant to the knowing possession of contraband:

> (1) the defendant's presence when a search is conducted; (2) whether the contraband was in plain view; (3) the defendant's proximity to and the accessibility of the narcotic; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband or narcotics when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of contraband; (10) whether other contraband or drug paraphernalia were present; (11) whether the defendant owned or had the right to possess the place where the drugs were found; (12) whether the place where the drugs were found was enclosed; (13) whether the defendant was found with a large amount of cash; and (14) whether the conduct of the defendant indicated a consciousness of guilt.

Evans v. State, 202 S.W.3d 158, 162 n. 12 (Tex. Crim. App. 2006); *Olivarez v. State*, 171 S.W.3d 283, 291 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Although these factors can help guide a court's analysis, ultimately the inquiry remains that set forth in *Jackson*: Based on the combined and cumulative force of the evidence and any reasonable inferences therefrom, was a jury rationally justified in finding guilt beyond a reasonable doubt? *Jackson*, 443 U.S. at 318-19.

Evidence of affirmative links in the present case

In the present case, Appellant contends the evidence is insufficient to establish possession of the controlled substance found in the baggie located in plain view inside the vehicle he was driving, as well as the baggie located on the parking lot pavement immediately outside the open door to Appellant's vehicle. Specifically, Appellant asserts the State failed to present affirmative link evidence of intentional or knowing possession and, as support, relies on the messy condition of the interior of the vehicle, and a lack of evidence showing he was in exclusive possession of the parking lot pavement.

The evidence, however, raises multiple affirmative links to support an inference of Appellant's knowing possession of the contraband located inside Appellant's vehicle. First, Appellant was in possession and control of the pickup truck, and the sole occupant of the vehicle when he was stopped by police. Therefore, Appellant was affirmatively linked to the vehicle despite the fact that other individuals may have had the right to use the vehicle, as suggested by Appellant in his brief.

In addition to Appellant's control over the vehicle, there are several other factors that affirmatively link Appellant to the methamphetamine found therein, including: (1) Appellant's presence when the vehicle was searched (7 R.R. 108-109);

(2) the methamphetamine was in plain in view within the cab of the truck (7 R.R. 109); (3) the methamphetamine was accessible to Appellant because it was located in the cab of the truck next to the driver's seat (7 R.R. 109-110); (4) the officers on the scene testified that Appellant appeared to have the physical characteristics of being a meth user (7 R.R. 104-106); (5) Appellant had crystals in his pocket, which the officers recognized as methamphetamine residue (7 R.R. 103-104, 113); (6) Appellant was in possession of a firearm (7 R.R. 109), as well as a digital scale in the truck, which is commonly associated with the buying and selling of drugs (7 R.R. 186); (7) Appellant took longer than expected to stop his vehicle after Officer Connell initiated the traffic stop and attempted to exit the vehicle immediately upon stopping (7 R.R. 91-92, 95, 100); (8) the cab of Appellant's truck where the drugs were found was an enclosed space (SX 4); and (9) Appellant's conduct, including his attempt to exit of his truck immediately upon stopping and his looking in the direction of the baggie of methamphetamine on the pavement, demonstrated a consciousness of guilt. (7 R.R. 166-167). *See Olivarez*, 171 S.W.3d at 291-92; *see also Cuong Quoc Ly v. State*, 273 S.W.3d 778, 782 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd).

Appellant attempts to persuade this Court that the facts herein are similar to those in the *Kyte* opinion; however, the facts in *Kyte* are distinguishable from the

facts in the present case. In *Kyte*, this Court noted that the controlled substance was hidden from plain view. *Kyte v. State*, 944 S.W.2d 29, 33 (Tex. App.—Texarkana 1997, no pet.). Further, the officer who recovered the controlled substance from the vehicle testified that she conducted a search of the vehicle and she lifted up the carpet on the floorboard adjacent to the transmission shift lever. When she lifted up the carpet, she found a black wadded up piece of tape and a small round metal cylinder. Inside the tape and the cylinder, the officer found a white powdery substance. *Id*. at 32. In addition, the officer stated that the contraband was not in plain view, that there was no noticeable lump under the carpet where the drugs were found, that she did not find any further drugs on the defendant or in the vehicle, and that the vehicle was registered to the ex-husband of the defendant. *Id*. This Court concluded that, at best, the State had demonstrated "that contraband was under the floor, hidden from view, in a car that [the defendant] had borrowed from another person." *Id*. at 33. Based on these facts, this Court held that there were "not sufficient independent facts and circumstances to link [the defendant] affirmatively to the contraband." *Id*.

As previously noted, the facts in the present case are quite different as the methamphetamine found by the officers herein were both on Appellant's person, and in plain view inside the vehicle and immediately outside the vehicle. Further, the officers herein recovered a loaded handgun in plain view from the cab of the truck

and a digital scale. Accordingly, this Court should find that the facts herein are distinguishable from the facts in *Kyte*.

Moreover, Appellant argues that the evidence does not demonstrate that he intentionally or knowingly possessed that methamphetamine found on the parking lot pavement, immediately outside the driver side door of Appellant's truck.

The affirmative-links evidence with regard to the contraband found immediately outside Appellant's vehicle shows that: (1) Appellant was present at the scene where the methamphetamine was recovered (7 R.R. 108-109); (2) the contraband was found in plain view in the parking lot immediately outside of the driver side of the vehicle and Appellant had the driver side door open when officers arrived (7 R.R. 114-115); (3) the methamphetamine was found in close proximity to Appellant's vehicle (within a foot of the open driver's door) (7 R.R. 114); (4) Appellant had methamphetamine within reach inside the vehicle, as well as methamphetamine residue on his person when arrested (7 R.R. 103-104, 113); (5) a hand gun and digital scale, commonly used for weighing drugs, were found in the vehicle (7 R.R. 109, 186); (6) Appellant was the person operating the vehicle wherein the smaller amount of methamphetamine, scale and handgun were found in (7 R.R. 104); (7) although the baggie of methamphetamine was found in the parking lot outside the vehicle, the methamphetamine found in the parking lot was consistent

with and similar to the methamphetamine found inside the vehicle (7 R.R. 162); and (8) the amount of methamphetamine found, although only slightly more than five grams, was sufficient to warrant a second-degree felony conviction and the fact that a digital scale was also recovered suggests that it might not have been just for personal use, but could have been repackaged for distribution as well. (7 R.R. 186).

In light of the fact that the methamphetamine found in the vehicle was similar to and consistent with the methamphetamine found outside the vehicle, the evidence presented sufficient affirmative links to allow the jury to make a reasonable inference that the contraband inside and outside the vehicle was all possessed by Appellant. *See Rivera v. State*, 59 S.W.3d 268, 275 (Tex. App.—Texarkana 2001, pet. ref'd) (holding that a rational trier of fact could have found that Rivera was guilty of possession of the heroin found in a vehicle registered to him and that he had been seen driving, especially in light of the fact that Rivera had already been affirmatively linked to heroin his apartment.).

Therefore, this Court should hold that a reasonable jury could conclude from the evidence presented here that Appellant knowingly exercised possession and control over the methamphetamine located both inside and outside of his vehicle. Accordingly, the evidence is legally sufficient to support the verdict, and this Court should overrule Appellant's first issue.

State's Response to Appellant's Second issue

In his second issue, Appellant complains that the trial court erred in denying his pre-trial motion to suppress. Specifically, Appellant alleges that he was detained without reasonable suspicion and arrested without probable cause, in violation of the U.S. Constitution and article I, section 9 of the Texas Constitution. U.S. Const. amend. IV, Tex. Const. art. I, § 9. The State responds by asserting that the record herein reflects that Appellant was detained and arrested in accordance with the law and Constitution.

Relevant law concerning search and seizure

The Fourth Amendment does not forbid "all searches and seizures, but unreasonable searches and seizures." *Elkins v. United States*, 364 U.S. 206, 222 (1960). The Supreme Court has held police officers may stop and briefly detain persons reasonably suspected of criminal activity even if probable cause to arrest is not then present. *Terry v. Ohio*, 392 U.S. 1, 22 (1968). The Court of Criminal Appeals has held that occupants of an automobile are subject to temporary investigative detentions in the same manner as pedestrians. *Gearing v. State*, 685 S.W.2d 326, 328 (Tex. Crim. App. 1985) (op. on reh'g.); *see also Adams v. Williams*, 407 U.S. 143 (1972).

An officer may lawfully stop a motorist who commits a traffic violation. *McVickers v. State*, 874 S.W.2d 662, 664 (Tex. Crim. App. 1993); *Armitage v. State*, 637 S.W.2d 936, 939 (Tex. Crim. App. 1982). However, in determining whether a traffic violation has been committed, the *Terry* principles apply just as they do to other crimes. *Drago v. State*, 553 S.W.2d 375, 377-78 (Tex. Crim. App. 1977). If an officer has a reasonable basis for *suspecting* that a person has committed a traffic offense, the officer may legally initiate a traffic stop. *Id*.

In the present case, Appellant takes the position that Officer Connell did not have a legal basis to stop him, because Appellant's truck did, in fact, have a license plate attached to the rear of his truck, albeit a temporary, expired paper plate that was not properly illuminated. Accordingly, Appellant takes the position that he did not actually violate Section 504.943 of the Texas Transportation Code. *See* Tex. Transp. Code § 504.943. To justify the stop, however, it is not necessary that the State show that Appellant actually violated a traffic regulation. It is sufficient to show that the officer *reasonably suspected or believed* that a violation was in progress. *See Drago v. State*, 553 S.W.2d at 377-78; *Powell v. State*, 5 S.W.3d 369, 376-77 (Tex. App.—Texarkana 1999, pet. ref'd); *Edgar v. Plummer*, 845 S.W.2d 452, 454 (Tex. App.—Texarkana 1993, no writ); *Valencia v. State*, 820 S.W.2d 397, 400 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd).

Standard of Review of Suppression Issues

This Court reviews a trial court's ruling on a motion to suppress under a bifurcated standard of review. *Brodnex v. State*, 485 S.W.3d 432, 436 (Tex. Crim. App. 2016); *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). An appellate court reviews the trial court's factual findings for an abuse of discretion, but reviews the trial court's application of the law to the facts *de novo*. *Turrubiate*, 399 S.W.3d at 150. The Court reviews mixed questions of law and fact that do not turn on credibility and demeanor, as well as purely legal questions, *de novo*. *Brodnex*, 485 S.W.3d at 436; *State v. Woodard*, 341 S.W.3d 404, 410 (Tex. Crim. App. 2011).

The trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). When reviewing the ruling on a suppression motion, the trial judge's determination of facts—if supported by the record—is afforded almost total deference. *Woodard*, 341 S.W.3d at 410; *see also Valtierra*, 310 S.W.3d at 447. This Court gives the same deference to the trial court's conclusions with respect to mixed questions of law and fact that turn on credibility or demeanor. *State v. Ortiz*, 382 S.W.3d 367, 372 (Tex. Crim. App. 2012).

Regardless of whether a trial court grants or denies a motion to suppress, the reviewing court views the evidence in the light most favorable to the ruling. *Wade v. State*, 422 S.W.3d 661, 666 (Tex. Crim. App. 2013). When the trial court makes specific findings of fact,[2] the reviewing court determines whether the evidence, when viewed in the light most favorable to the trial court's ruling, supports the fact findings. *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006); *see also State v. Duran*, 396 S.W.3d 563, 571 (Tex. Crim. App. 2013). If the trial court fails to make a particular finding, the reviewing court implies a fact finding to support the trial court's ruling when the evidence supports the implied finding. *See Gutierrez v. State*, 221 S.W.3d 680, 687 (Tex. Crim. App. 2007). A reviewing court may reverse the trial court's ruling "only if it is arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.'" *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014) (*quoting State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)). The reviewing court will afford the prevailing party the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. *Duran*,

[2] The trial court herein did not make specific findings of fact, but merely made a ruling from the bench and advised the parties that she was denying the motion to suppress. 7 R.R. at 63-64. The failure of the trial court to enter any further findings of fact is of no consequence herein, as the record does not reflect that Appellant's counsel ever requested the entry of findings with regard to the motion to suppress. *See State v. Cullen*, 195 S.W.3d 696, 699 (Tex. Crim. App. 2006) ("*upon the request* of the losing party on a motion to suppress evidence, the trial court shall state its essential findings.") (emphasis added).

396 S.W.3d at 571. An appellate court must uphold the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Story*, 445 S.W.3d at 732; *Turrubiate*, 399 S.W.3d at 150.

Officer Connell had reasonable suspicion to detain Appellant

In the present case, Officer Connell testified that he believed that Appellant's truck did not have a license plate. Appellant contends that Officer Connell's belief was not reasonable. Appellant claims that Connell did not testify about any conditions that made it difficult for him to see the license plate, and therefore it was simply not believable. Appellant is incorrect. Officer Connell testified that he did not see a rear license plate on Appellant's truck, and that based on his experience and training, vehicles usually have the license plate displayed on the center bumper area of the vehicle. 7 R.R. 9-10. After Officer Connell stopped Appellant he did notice that the vehicle did have an expired, temporary paper tag affixed to the leftmost portion of the rear of the vehicle. 7 R.R. 22-24. Upon closer inspection, that temporary paper tag was heavily worn, obscured and difficult to read. 7 R.R. 22. Connell further stated that there was no white light illuminating the plate, as required by the transportation code. 7 R.R. 24-25. Given these uncontested facts, it is entirely reasonable that Officer Connell did not see a license plate on the rear on Appellant's

vehicle, and therefore he reasonably believed Appellant to be driving a vehicle without a license plate.

Appellant was not initially placed under arrest

Appellant further contends that Appellant was not merely detained by Officer Connell, but rather he was immediately placed under arrest, and the officers had no probable cause to arrest Appellant. Appellant relies on the fact that Officer Connell immediately handcuffed Appellant as support for his argument that he was placed under custodial arrest. Appellant's Brief p. 24. The State responds by asserting that the mere fact that Appellant was asked to exit the vehicle and was handcuffed is not dispositive of whether Appellant was placed under arrest.

The Ninth Circuit Court of Appeals has held that police officers may ask passengers to exit a vehicle after the officers have stopped the car in order to protect the officers. *Ruvalcaba v. Los Angeles, Ca.*, 64 F.3d 1323, 1327 (9th Cir. 1995). The court, in effect, found asking the occupants to exit the vehicle was a minimal intrusion on their privacy interests and this intrusion was outweighed by the officers' reasonable concern for their safety. In *Ruvalcaba*, as in the present case, it was the driver, not any passenger, who acted in a suspicious or threatening manner (by taking longer than usual to stop) or was believed to be dangerous. *Id*. at 1326-27.

In this regard, the Court of Criminal Appeals has quoted, with approval, Professor LaFave who wrote:

> The correct view, then, is that an otherwise valid stop is not inevitably rendered unreasonable merely because the suspect's car was boxed in by police cars in order to prevent it from being moved. Likewise, it cannot be said that whenever police draw weapons the resulting seizure must be deemed an arrest rather than a stop and thus may be upheld only if full probable cause was then present. The courts have rather consistently upheld such police conduct when the circumstances indicated that it was a reasonable precaution for the prevention and safety of the investigating officers. Similarly, handcuffing of the suspect is not ordinarily proper, but yet may be resorted to in special circumstances, such as when necessary to thwart the suspect's attempt "to frustrate further inquiry."

Rhodes v. State, 945 S.W.2d 115, 117 (Tex. Crim. App. 1997) (*quoting* 3 LaFave, Search and Seizure, Sec. 9.2(d), 364 (1987)). *See also*, 4 LaFave, Search and Seizure, Sec. 9.2(d), 36-38 (1996).

Thus, officers may use such force as is reasonably necessary to effect the goal of the stop: investigation, maintenance of the *status quo*, or officer safety. *United States v. Sokolow*, 490 U.S. 1, 10-11 (1989); *United States v. Weaver*, 8 F.3d 1240, 1244 (7th Cir.1993); *Ruvalcaba*, 64 F.3d at 1327; *Rhodes*, 945 S.W.2d at 117. Further, the Court of Criminal Appeals has held that courts will follow the federal *Terry* standard with respect to temporary investigative stops and have found no reason to employ a more stringent standard under the Texas Constitution with respect to such stops. *Rhodes*, 945 S.W.2d at 117.

Although there is no "bright-line" rule to distinguish the two, the Court of Criminal Appeals cited Professor Dix's treatise on the subject and notes that Texas cases are generally categorized as an "arrest" or "detention" depending upon several factors, including the amount of force displayed, the duration of a detention, the efficiency of the investigative process and whether it is conducted at the original location or the person is transported to another location, the officer's expressed intent—that is, whether he told the detained person that he was under arrest or was being detained only for a temporary investigation, and any other relevant factors. *See State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008) (*citing* 40 George E. Dix and Robert O. Dawson, Texas Practice: Criminal Practice and Procedure § 7:34 (2nd ed. 2001)); *see now* 40 George E. Dix and John M. Schmolesky, Texas Practice: Criminal Practice and Procedure §10.20 (3rd ed. 2011); *see also Sokolow*, 490 U.S. at 10 (police are not required to use "least intrusive means" to verify or dispel their suspicions; officers were not unreasonable in forcibly detaining defendant).

Officer Connell testified he was not arresting Appellant when he handcuffed him. 7 R.R. 31, 103, 111. Connell further stated that he did not place Appellant under arrest until the controlled substance was located in plain view inside and outside Appellant's vehicle. (7 R.R. 117). As noted, the officer's testimony is a factor to be

considered, along with the other facts and circumstances of the detention, in determining whether an arrest has taken place. *Amores v. State*, 816 S.W.2d 407, 412 (Tex. Crim. App. 1991). Officer Connell also testified he placed handcuffs on Appellant primarily out of concern for officer safety, based on the circumstances. 7 R.R. 18. Further, the record reflects that the initial detention was relatively short in duration, as the officers quickly and efficiently patted down Appellant for weapons, consensually searched his pockets and made a visible scan of the areas of the truck in plain view to determine in Appellant was in possession of any weapons (7 R.R. 103-104, 108-109). It was during this initial pat down and plain view search, which occurred within the first two and a half minutes of the traffic stop, that officers discovered controlled substance on Appellant's person and in the vehicle, as well as a weapon in the cab of the truck. (7 R.R. 109, 112). At that point, officers then had probable cause to place Appellant under arrest. *See Mays v. State*, 726 S.W.2d 937, 944 (Tex. Crim. App. 1986) (holding that officer's conduct in handcuffing two men did not amount to an arrest and actions were reasonable and justified under the circumstances, as the facts demonstrated reasonable suspicion rapidly escalating to probable cause for an arrest).

Appellant appears to be implicitly advocating a bright-line test providing that mere handcuffing is always the equivalent of an arrest. "Much as a 'bright-line rule'

would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria." *Rhode*, 945 S.W.2d at 118 (*citing United States v. Sharpe*, 470 U.S. 675, 686 (1985)).

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical definition. "Reasonableness" must be judged from the perspective of a reasonable officer at the scene, rather than with the advantage of hindsight. Furthermore, allowances must be made for the fact that officers must often make quick decisions under tense, uncertain and rapidly changing circumstances. *Rhodes*, 945 S.W.2d at 118, *citing Terry v. Ohio*, 392 U.S. at 80; *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *Graham v. Connor*, 490 U.S. 386, 396 (1989). The trial court's denial of the motion to suppress was not error, as the evidence supports a finding that Officer Connell made a temporary investigative detention of Appellant under *Terry* (and its progeny) that was reasonable and justified under the circumstances surrounding the detention, and which is soundly based on applicable case law.

Accordingly, Appellant's second issue should be overruled.

State's Response to Appellant's Third Issue

In his third issue on appeal, Appellant argues that the trial court erred when it denied Appellant a jury instruction pursuant to article 38.23 of the Texas Code of Criminal Procedure. The State responds by asserting that the trial court did not err in denying said jury instruction because Appellant failed to demonstrate any disputed issue of fact that would entitle him such an instruction.

The law concerning article 38.23 instructions

A defendant's right to the submission of jury instructions under Article 38.23(a) is limited to disputed issues of fact that are material to his claim of a constitutional or statutory violation that would render evidence inadmissible. *Pierce v. State*, 32 S.W.3d 247, 251 (Tex. Crim. App. 2000) (jury instruction can operate "only if there is a contested issue of fact about the obtaining of the evidence... . There is no issue for the jury when the question is one of law only."); *see also* Tex. Code Crim. Proc. art. 38.23(a). The Court of Criminal Appeals has previously explained:

> The terms of the statute are mandatory, and when an issue of fact is raised, a defendant has a statutory right to have the jury charged accordingly. The only question is whether under the facts of a particular case an issue has been raised by the evidence so as to require a jury instruction. Where no issue is raised by the evidence, the trial court acts properly in refusing a request to charge the jury.

Murphy v. State, 640 S.W.2d 297, 299 (Tex. Crim. App. 1982) (citations omitted).

There are three requirements that a defendant must meet before he is entitled to the submission of a jury instruction under Article 38.23(a):

(1) The evidence heard by the jury must raise an issue of fact;

(2) The evidence on that fact must be affirmatively contested; and

(3) That contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the evidence.

Madden v. State, 242 S.W.3d 504, 510 (Tex. Crim. App. 2007).

There must be a genuine dispute about a material fact. *Garza v. State*, 126 S.W.3d 79, 85 (Tex. Crim. App. 2004) (noting that "an Article 38.23 instruction must be included in the jury charge only if there is a factual dispute about how the evidence was obtained"). If there is no disputed factual issue, the legality of the conduct is determined by the trial judge alone, as a question of law. *See e.g.*, *id*. at 87 (defense attorney's allusions on cross-examination and during closing argument that officers violated the sheriff's department inventory-search guidelines and actually began search to look for drugs did not raise a fact issue and "cannot be seen as any more than an opinion or unsupported allegation"); *Wesbrook v. State*, 29 S.W.3d 103, 121 (Tex. Crim. App. 2000) (noting that "a trial court is required to include an Article 38.23 instruction in the jury charge only if there is a factual dispute as to how the evidence was obtained. In the instant case, there was no dispute as to

the facts surrounding the acquisition of [witness's] testimony. The only determination to be made in this case was of a legal nature, not factual.") (citation omitted). And if other facts, not in dispute, are sufficient to support the lawfulness of the challenged conduct, then the disputed fact issue is not submitted to the jury because it is not material to the ultimate admissibility of the evidence. *Madden*, 242 S.W.3d at 510. The disputed fact must be an essential one in deciding the lawfulness of the challenged conduct. *See id.* at 511 (*quoting* 40 George E. Dix & Robert O. Dawson, Texas Practice: Criminal Practice and Procedure § 4.194, at 284 (2nd ed. 2001) ("Jury submission, then, is only required when facts are raised that are necessarily determinative of the admissibility of the challenged evidence.")).

Appellant Did Not Request an Instruction on a Disputed Fact.

The first requirement for obtaining a jury instruction under Article 38.23, is that the defendant requests an instruction on a specific historical fact or facts. The jury decides facts; the judge decides the application of the law to those facts. *See* Tex. Code Crim. Proc. Art. 36.13 ("Unless otherwise provided in this Code, the jury is the exclusive judge of the facts, but it is bound to receive the law from the court and be governed thereby.").

In this case, Appellant requested a jury instruction dealing with his stop and detention by Officer Connell. C.R. at 117-118. This requested instruction was

wholly incorrect. *Madden*, 242 S.W.3d at 511. It did not ask the jury to decide a disputed issue of historical fact. It asked the jury to decide a question of law-whether Officer Connell had "reasonable suspicion" to detain Appellant. C.R. 117-118. "Reasonable suspicion," in this context, is not the type of suspicion, hunch, or notion that the ordinary person might have. Rather, it is a legal term of art. *Id*. The jury, however, is not an expert on legal terms of art or the vagaries of the Fourth Amendment. *Id*. It cannot be expected to decide whether the totality of certain facts do or do not constitute "reasonable suspicion" under the law. *Id*. That would require a lengthy course on Fourth Amendment law. Even many experienced lawyers and judges disagree on what constitutes "reasonable suspicion" or "probable cause" in a given situation. It is the trial judge who decides what quality and quantum of facts are necessary to establish "reasonable suspicion." *Id*. Only if one or more of those necessary facts are disputed does the judge ask the jury to decide whether the it believes that disputed facts actually occurred. *Id*.

Looking just at Appellant's requested jury instruction, neither the trial judge, nor this Court could have any idea of what specific fact or facts Appellant believed were in dispute. In his Brief to this Court, Appellant claims that the facts that Officer Connell relied upon to establish "reasonable suspicion" were not reasonable. But when the trial judge asked appellant to tell her precisely what facts he thought were

in dispute, he focused not on what the officer saw or did not see; but rather, he focused primarily on what the officer could have seen or should have seen. 8 R.R. at 13. The trial court found that there was no dispute of fact.

> All right. Mr. Stark, while I tend to usually try to include everything in a jury charge because I'd rather err on the side of caution since the most overturned -- things that are most overturned are based on a charge, I'm not sure in this case we get to that point because I don't think the actual issue at dispute is actually whether -- I think that the officer testified he didn't see it, and there's a video, and I think the jury can sort of do what they want with that.
>
> * * * * *
>
> I don't -- I do think, though, that the only -- that I don't really think there's a disputed issue of fact. I think it's a disputed issue of law, which was decided by me yesterday. So I am not going to include the charge, and I will note your objection.

8 R.R. at 16-17.

The trial judge was correct. What Appellant wanted was a jury instruction on whether the totality of facts that Officer Connell listed constituted "reasonable suspicion" under the Fourth Amendment. Appellant's proposed instruction focused only on the law. It did not set out any specific, disputed historical fact that the jury was to focus upon and then decide. Instead, Appellant wanted the jury to decide if Officer Connell was unreasonable in relying upon his belief that the vehicle did not have a license plate as a basis for his articulable suspicion to detain. The same was

true of Appellant's argument to the trial judge concerning the wording of his proposed instruction:

> [Officer Connell] testified that he couldn't see [the license plate]. He testified that he was within 50 feet of it. But the evidence I suggest to you says that he could have seen it, should have seen it, and yet -- And so it raises an issue in the jury's mind of whether or not –and a proper issue for the Court's mind of whether or not this is a lawful stop.
>
> And I think that it's altogether proper for the Court to instruct the jury on lawful stops. And basically if you'll look at the outline of the way this -- the proposed charge reads, it says that basically there are a number of reasons that an officer can stop a person, and it includes all the ways.

8 R.R. at 13-14.

Appellant's counsel argues that the issue raised is whether or not this is a lawful stop; however, the jury cannot make the legal determination of whether certain facts do or do not constitute a lawful stop. *See Garza*, 126 S.W.3d at 86 (stating, "That appellant 'disagrees with the conclusion that probable cause was shown as a matter of law' is not the same as appellant controverting the facts. ... The question of whether the search was legal is a question of law, as none of the circumstances surrounding the search were controverted by appellant."). Because Appellant never presented a proposed jury instruction that asked the jury to decide disputed facts, any potential error in the charge should be reviewed only for "egregious harm" under *Almanza*. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). Nevertheless, there was no error at all because there was no

conflict in the evidence that raised a disputed fact issue material to the legal question of "reasonable suspicion" to detain him, and therefore, Appellant was not entitled to an article 38.23 instruction.

Appellant was not entitled to an instruction

Under Article 38.23(a), "[n]o evidence obtained by an officer ... in violation of any provisions of the Constitution or laws ... shall be admitted in evidence against the accused" at trial. Tex. Code Crim. Proc. art. 38.23(a). When evidence presented before the jury raises a question of whether the fruits of a police-initiated search or arrest were illegally obtained, "the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained." *Id*. As previously noted, to be entitled to an Article 38.23(a) instruction, a defendant must show that (1) an issue of historical fact was raised in front of the jury; (2) the fact was contested by affirmative evidence at trial; and (3) the fact is material to the constitutional or statutory violation that the defendant has identified as rendering the particular evidence inadmissible. *Madden*, 242 S.W.3d at 509-10. When a disputed, material issue of fact is successfully raised, the terms of the statute are mandatory, and the jury must be instructed accordingly. *Id*. at 510. Evidence to justify an Article 38.23(a) instruction can derive "from any source," no matter

whether "strong, weak, contradicted, unimpeached, or unbelievable." *Garza*, 126 S.W.3d at 85. But it must, in any event, raise a "*factual* dispute about how the evidence was obtained." *Id*. (emphasis added).

However, in a situation such as the present one, where the issue raised by the evidence at trial does not involve controverted historical facts, but only the proper application of the law to undisputed facts, that issue is properly left to the determination of the trial court. *Robinson v. State*, 377 S.W.3d 712, 719 (Tex. Crim. App. 2012); *see also e.g., Mahaffey v. State*, 364 S.W.3d 908, 912 n. 8 (Tex. Crim. App. 2012) ("Unlike *Madden*, here there is no mistake about the historical facts. Rather, the matter before us is the *application of the law to the facts*.") (emphasis added); *see also Garcia v. State*, 43 S.W.3d 527, 531 (Tex. Crim. App. 2001) (In addressing the sufficiency of the facts to justify the stop, the Court explained that the issue was an application of the law to the facts.); *Wesbrook*, 29 S.W.3d at 121 (In reviewing defendant's claim that his cellmate violated his Sixth Amendment right to counsel by relaying to the prosecution statements the defendant made while in jail, and thus, that he was entitled to an Article 38.23 instruction on the legality of the evidence obtained, the Court held that "there was no dispute as to the facts surrounding the acquisition of [the cellmate's] testimony. The only determination to be made in this case was of a legal nature, not factual. Appellant was not entitled to

the requested jury instruction.") (citation omitted). *See also McRae v. State*, 152 S.W.3d 739, 748 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) ("The *trial court* was ... required to apply the law to the undisputed facts to make a legal conclusion about probable cause [to arrest the defendant for driving while intoxicated]. No jury instruction was required because there were no facts in dispute.") (emphasis added); *Mills v. State*, 296 S.W.3d 843, 845 (Tex. App.—Austin 2009, pet. ref'd) (In reviewing Mills's complaint that the trial court refused to include an Article 38.23 instruction in the jury charge, the Austin Court of Appeals explained that "[w]hether reasonable suspicion is present is a question of law for the trial court when there is no dispute concerning the existence of the underlying historical facts from which that determination is made." (*citing Madden*, supra, at 510-12)); *Alcocer v. State*, 256 S.W.3d 398, 399 (Tex. App.—San Antonio 2008, no pet.) ("When essential facts concerning the search or arrest are not in dispute, the legality of the search or arrest is a question of law, not fact, and no jury instruction is required."); *White v. State*, 201 S.W.3d 233, 248-49 (Tex. App.—Fort Worth 2006, pet. ref'd) (holding that, where there was "no dispute ... as to the *facts* upon which the exigent circumstances [to enter the defendant's home without a warrant] were determined[,]" the defendant was not entitled to an Article 38.23 instruction because "[w]hether a search is reasonable is a question of law" for which "*courts* should

carefully apply the objective standard of reasonableness" and should "take[ ] into account the facts and circumstances known to the police at the time of the search") (emphasis added).

In the present case, Officer Connell testified that he did not see a license plate on the back of Appellant's vehicle. This fact was not contested. The evidence was also uncontested that Appellant's vehicle did have a faded, expired, temporary plate displayed in a location that was not illuminated. Given that these facts were not contested, Appellant was not entitled to an Article 38.23 instruction because the matter involved merely the application of the facts to the law, which was properly left to the determination of the trial court. *Robinson*, 377 S.W.3d at 719.

Accordingly, Appellant's third issue on appeal should be overruled.

State's Response to Appellant's Fourth Issue

In his fourth issue, Appellant complains that his sentence of 20 years' confinement in the penitentiary violates the prohibitions against cruel and unusual punishment in the Eighth Amendment of the U.S. Constitution and Article I, section 13 of the Texas Constitution. U.S. Const. amend. VIII; Tex. Const. art. I, § 13. The State responds by asserting that in light of the evidence presented during trial, Appellant's sentence is not grossly disproportionate to the offense, when considering

the Appellant's culpability and his prior unadjudicated offenses.

The State concedes that an allegation of disproportionate punishment can be a valid legal claim. The concept of proportionality is embodied in the Constitution's ban on cruel and unusual punishment and requires that punishment be graduated and proportioned to the offense. U.S. Const. amend VIII. However, the State would note that this is a narrow principle that does not require strict proportionality between the crime and the sentence. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring). Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime. *Ewing v. California*, 538 U.S. 11, 23 (2003) (plurality opinion). While the United States Supreme Court has acknowledged the lack of clarity in its precedent regarding what factors may indicate gross disproportionality, it has nevertheless emphasized that a sentence is grossly disproportionate to the crime only in the exceedingly rare or extreme case. *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003). Moreover, the Court of Criminal Appeals has traditionally held that punishment assessed within the statutory limits, including punishment enhanced pursuant to a habitual-offender statute, is not excessive, cruel, or unusual. *See Ex parte Chavez*, 213 S.W.3d 320, 323-24 (Tex. Crim. App. 2006); *State v. Simpson*, 488 S.W.3d 318, 322-23 (Tex. Crim. App. 2016).

To determine whether a sentence for a term of years is grossly

disproportionate for a particular defendant's crime, a court must judge the severity of the sentence in light of the harm caused or threatened to the victim, the culpability of the offender, and the offender's prior adjudicated and unadjudicated offenses. *Graham v. Florida*, 560 U.S. 48, 60 (2010); *see also McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir. 1992) (noting that the Supreme Court's holding in *Harmelin v. Michigan*, 501 U.S. 957 (1991) modified the gross-disproportionality test previously set out in *Solem v. Helm*, 463 U.S. 277 (1983)). In the rare case in which this threshold comparison leads to an inference of gross disproportionality, the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. *Graham*, 560 U.S. at 60; *Simpson*, 488 S.W.3d at 323. If this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual. *Graham*, 560 U.S. at 60; *Simpson*, 488 S.W.3d at 323.

Only twice has the Supreme Court held that a non-capital sentence imposed on an adult was constitutionally disproportionate. *See United States v. Farley*, 607 F.3d 1294, 1336-37 (11th Cir. 2010) (singling out *Weems v. United States*, 217 U.S. 349 (1910) (fifteen years punishment in a prison camp grossly disproportionate to crime of falsifying a public record) and *Solem v. Helm*, 463 U.S. 277 (1983) (life

imprisonment without parole grossly disproportionate sentence for crime of uttering a no-account check for $100)). Further, the Supreme Court has rejected a disproportionality attack on a sentence of twenty-five years to life imposed under California's "Three Strikes and You're Out" law, brought by a defendant who merely stole three golf clubs. *Ewing*, 538 U.S. at 29–30. The Supreme Court directly addressed felony recidivism in *Ewing*, holding that, "[i]n weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions." *Id*. at 29.

In the present case, Appellant was sentenced to 20 years' incarceration in the penitentiary for possession of four grams or more, but less than 200 grams, of a controlled substance, to wit: methamphetamine. C.R. at 126. His sentence falls within the statutory limits. Tex. Health & Safety Code § 481.115; Tex. Penal Code § 12.33. The evidence at trial revealed that Appellant not only possessed the contraband, but that he also distributed the drugs. (10 R.R. 117). In support of this inference, the State would note that a digital scale was also recovered in Appellant's vehicle, which Appellant admitted was used to weigh drugs. (10 R.R. 118-119). The jury was entitled to consider the evidence of such an aggravating factor when setting

Appellant's sentence. Further, during the punishment phase of trial, the evidence established that Appellant's culpability for the charged crime was high, as Appellant admitted knowingly possessing the entire amount of methamphetamine, including the portion found outside the truck. (10 R.R. 114). Further, Appellant agreed that the amount of methamphetamine found in his vehicle was a lot of meth. (10 R.R. 116).

Additionally, the State presented evidence that Appellant was involved in the burglary of a habitation wherein some 30 or so firearms were stolen from the home. (8 R.R. 55-58, 143-169, 170, 181, 182-219). Again, the jury was entitled to take into account evidence of this extraneous offense when determining Appellant's sentence. *See Ewing*, 538 U.S. at 29-30. The details of the burglary and the resulting theft of so many firearms was extremely disconcerting and would justify a jury assessing a harsher sentence. Accordingly, after reviewing the record, this Court should find that this is not one of those "rare" cases that leads to the inference that Appellant's sentence was grossly disproportionate to the offense. Consequently, this Court should conclude that there is no inference of disproportionality that would justify comparing Appellant's sentence to those imposed on other offenders. *Cf. Simpson*, 488 S.W.3d at 323-24 (upholding twenty-five-year sentence for robbery; reasoning that because the defendant's sentence fell within the statutory range of five years to life, there was "no reason to compare his sentence to sentences imposed on others—

including the probated sentence of the main actor in this case").

Therefore, Appellant's fourth issue should be overruled.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State of Texas prays that this Court will overrule all of Appellant's issues on appeal and affirm the trial court's judgment of conviction and sentence herein.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document contains 8,592 words (excluding the cover, table of contents and table of authorities). The body text is in 14-point font, and the footnote text is in 12-point font.

/s/ René B. González
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing State's appellate Brief was electronically served upon Appellant's counsel of record, Mr. Kevin Stryker, 1811 North Austin Street, Suite 204, Georgetown, Texas 78626, at Strykerlawfirm@gmail.com on the 11th day of January, 2019.

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